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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jane Doe, a minor, by and through her) No. CV09-1329-PHX-DGC
10 Special Conservator, Josephine Gortarez,)
11 Plaintiff,) **ORDER**
12 vs.)
13 Department of Homeland Security,)
14 Defendant.)

15 Plaintiff is a minor child who brought suit in Maricopa County Superior Court against
16 the Scottsdale Unified School District (“SUSD”) and American Building Maintenance Co.
17 (“ABM”) “for personal injuries and other damages arising from [her] sexual assault, rape,
18 assault and battery, false imprisonment, and other injuries sustained at the hands of a janitor,
19 Roberto Lemus-Retana . . . an illegal alien, employed by [ABM] . . . while working at
20 Saguaro High School in Scottsdale, Arizona.” Doc. 32 at 13. Plaintiff alleges that SUSD
21 and ABM negligently hired and supervised Mr. Lemus-Retana.

22 After filing the Superior Court litigation, Plaintiff initiated an inquiry into Mr. Lemus-
23 Retana’s alien status in the United States. *Id.* Plaintiff also sought records confirming the
24 legal status of 95 employees who were working for ABM in 2006 while Mr. Lemus-Retana
25 was employed. *Id.* at 13-15. She sought those records for purposes of potentially proving
26 in the Superior Court litigation that ABM was negligent in screening its employees before
27 hiring them. *Id.* at 1.

28 By stipulation, the United States Department of Homeland Security (“DHS”)

1 provided Plaintiff with the relevant immigration information concerning Mr. Lemus-Retana.
2 The information confirmed that he was in the United States illegally at the time of the assault.
3 Plaintiff used immigration expert Neville Cramer to perform an investigation using the E-
4 Verify system, which gave a preliminary indication that 93 out of 95 of ABM's other
5 employees were not authorized to work in the United States. Doc. 33 at 1. After receiving
6 this information, Plaintiff sent a request for disclosure to DHS, pursuant to 6 C.F.R. § 5.45
7 (the "*Touhy* request"), in which she sought written confirmation of the legal status of the 95
8 employees. Doc. 32 at 13-19. This Court ordered DHS to respond to the request by April 9,
9 2010. Doc. 27. On April 8, 2010, DHS responded and refused to provide Plaintiff with the
10 requested information, claiming that it need not provide the information under relevant
11 agency regulations. Doc. 32 at 24-26.

12 The parties have now submitted briefing on whether DHS should be required to
13 comply with the *Touhy* request. Docs. 32, 33, 34, 35. For reasons that follow, the Court
14 finds that DHS has not abused its discretion.

15 **I. APA Review.**

16 This Court has authority to review DHS's denial of Plaintiff's *Touhy* request under
17 the Administrative Procedures Act ("APA"). DHS asserts that APA review is required in this
18 case (Doc. 33), and Plaintiff does not disagree (Doc. 34).

19 Under the APA, a court may "set aside agency action, findings, and conclusions found
20 to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
21 law[.]" 5 U.S.C. § 706(2)(A). "Under the arbitrary and capricious standard, a reviewing
22 court must determine whether an agency's decision was based on a consideration of the
23 relevant factors and whether there has been a clear error of judgment." *Mt. St. Helens Mining*
24 *& Recovery Ltd. P'Ship v. U.S.*, 384 F.3d 721, 728 (9th Cir. 2004). This standard "is highly
25 deferential, presuming the agency action to be valid and affirming the agency action if a
26 reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund v. Dep't of*
27 *Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotation and citation omitted).

1 **II. *Touhy* Requests.**

2 In *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court upheld the
3 authority of federal agencies to promulgate procedural regulations governing “the custody,
4 use and preservation of [its] records, papers and property.” Under *Touhy*, a federal agency
5 can create its own regulations for when it will disclose information to third parties. DHS
6 regulations for *Touhy* requests are found at 6 C.F.R. § 5.45 and 6 C.F.R. § 5.48. Under the
7 regulations, DHS must consider the following factors in determining whether to grant a
8 request for information:

- 9 (1) Whether such compliance would be unduly burdensome or otherwise
10 inappropriate under the applicable rules of discovery or the rules of procedure
 governing the case or matter in which the demand arose;
- 11 (2) Whether compliance is appropriate under the relevant substantive law
12 concerning privilege or disclosure of information;
- 13 (3) The public interest;
- 14 (4) The need to conserve the time of Department employees for the conduct of
 official business;
- 15 (5) The need to avoid spending the time and money of the United States for
16 private purposes;
- 17 (6) The need to maintain impartiality between private litigants in cases where
 a substantial government interest is not implicated;
- 18 (7) Whether compliance would have an adverse effect on performance by the
19 Department of its mission and duties; and
- 20 (8) The need to avoid involving the Department in controversial issues not
 related to its mission.

21 6 C.F.R. § 5.48(a).

22 The regulations also require the party requesting the information to explain why the
23 information is relevant:

24 If official information is sought, through testimony or otherwise, by a request
25 or demand, the party seeking such release or testimony must (except as
26 otherwise required by federal law or authorized by the Office of the General
 Counsel) set forth in writing, and with as much specificity as possible, the
 nature and relevance of the official information sought.

27 6 C.F.R. § 5.45(a).

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1 **III. Analysis.**

2 DHS concluded that compliance with Plaintiff's request would be unduly burdensome,
3 requiring 40 hours of initial inquiry and an additional 2,200 hours of investigation. Doc. 32
4 at 25. The Court finds this conclusion to be reasonable.

5 DHS based its estimate on a few important facts: Plaintiff did not seek documents,
6 but instead sought written verification of the immigration status of all 95 employees and
7 designation of a DHS agent or officer to provide deposition and trial testimony. *Id.* at 15.
8 The thrust of Plaintiff's request was a determination of whether the 95 employees were
9 authorized to work in this country. Such a determination, DHS explained, would require
10 more than simple verification of immigration status: "Having permission to be present in the
11 United States and permission to work in the United States are two different matters.
12 Individuals who may be lawfully present in the United States may not have authorization to
13 work (i.e., nonimmigrant visitors for pleasure), while those who may be unlawfully present
14 in the United States may have authorization to work (i.e., aliens who entered without
15 inspection but have received work authorization through certain programs)." *Id.* at 25.

16 DHS provided this explanation for its work estimate:

17 Determining whether 95 individuals maintain lawful presence in the
18 United States is a task that is not as simple as running names through a single
19 database. We estimate that running the names, dates of birth, social security
20 numbers, and other identifying information through the appropriate DHS
21 databases would require approximately forty man hours. Once we obtain this
22 information, we would likely have to conduct further investigation to confirm
23 their status in the United States and then to determine whether they have
24 authorization to work. Such investigation would likely require pulling
25 additional information from multiple databases, searching for and reviewing
26 hard copies of documents and files, and potentially interviewing individuals
27 as well. As you may be aware, the non-existence of a record for an individual
28 might mean that the individual is not lawfully present in the United States, but
might also mean that the individual is a United States citizen. As such, in-
person interviews would be necessary to confirm whether or not these 95
individuals have authorization to work in the United States. It is our estimate
that compliance with your request would require approximately thirty days and
involve ten investigators, for a total of 2200 man hours. It is therefore our
position that compliance would be unduly burdensome.

27 *Id.*

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1 Plaintiff argues that DHS's estimate is wrong. Plaintiff provides the affidavit of its
2 immigration expert, Neville Cramer, who opines that the entire search will take less than one
3 hour. In providing this opinion, however, Mr. Cramer asserts that the search should be
4 conducted by U.S. Citizenship and Immigration Service ("USCIS") in Los Angeles, not by
5 Immigration and Customs Enforcement ("ICE") as suggested in DHS's response. *Id.* at 30.
6 But Plaintiff's *Touhy* request did not ask that the search be conducted by USCIS; it
7 specifically was directed to ICE. *Id.* at 13.

8 In addition, Mr. Cramer states that "[s]tatistics have shown from studies on the use
9 of E-Verify that in most cases where information provided on the I-9's is not initially
10 verified, the vast majority of cases result in 'No Record' being located at Homeland Security,
11 or a record is located, but the alien is not legally authorized to work (as in cases where an
12 alien has 'entered without inspection'). In these cases, *no further checks are required*, and
13 the employee is determined to be unauthorized to work in the U.S." *Id.* at 30 (emphasis
14 added). Mr. Cramer seems to be suggesting that DHS could rely on statistical probabilities
15 and limit its search to initial database inquiries, but this certainly was never suggested in
16 Plaintiff's *Touhy* request. That request sought "written verification," "signed or executed by
17 an authorized agent or representative of the United States Department of Homeland
18 Security," and an agent or officer to testify under oath in a deposition or at trial. DHS could
19 not reasonably rely on mere statistical probabilities to provide such definitive proof of
20 whether the 95 employees were authorized to work in the United States.

21 Moreover, if statistical probabilities are all that is needed, Mr. Cramer can provide that
22 evidence himself. He has conducted the E-Verify search that has produced the initial results,
23 and presumably could testify to their statistical significance.

24 DHS provided several other reasonable explanations for its decision to deny Plaintiff's
25 request:

26 In addition, we believe that our compliance with your request would
27 require DHS to become involved in a matter between private litigants where
28 a substantial government interest is not implicated. To do so would allow a
private party to initiate enforcement actions against private businesses that
may not already be the subject of an open DHS investigation. On the other

1 hand, to the extent that [ABM] or its employees are already under investigation
2 by DHS, compliance with your request potentially could impede such
3 investigation. Moreover, once it became known in the business community
4 that DHS would perform these checks at the behest of a private party, we could
easily anticipate that other businesses would seek that we do the same so as to
obtain a competitive advantage.

5 *Id.* at 25.

6 DHS also observed that Plaintiff had not demonstrated the relevancy of the requested
7 information in the state court lawsuit. *Id.* at 24. This conclusion was reasonable in light of
8 the fact that DHS had before it competing memoranda on the relevancy of the information
9 prepared by Plaintiff and ABM. ABM's memorandum, which argued that the information
10 would not be relevant, included a more detailed discussion of the law that would govern
11 relevancy in state court. Doc. 33-3.


12 As already noted, under the arbitrary and capricious standard, the Court must
13 determine whether DHS's decision was based on a consideration of the relevant factors and
14 whether there was a clear error of judgment. *Mt. St. Helens Mining*, 384 F.3d at 728. The
15 standard is highly deferential, presuming the agency action to be valid and affirming the
16 agency action if a reasonable basis exists for its decision. *Ranchers Cattlemen Action Legal*
17 *Fund*, 499 F.3d at 1115. The Court cannot conclude that DHS failed to consider relevant
18 factors or committed a clear error of judgment. Each of the factors considered by DHS is set
19 forth in the relevant regulations, and DHS's consideration of those factors was reasonable.
20 Affording the agency appropriate deference, the Court concludes that DHS's denial of the
21 *Touhy* request was not arbitrary, capricious, or an abuse of discretion.

22 **IT IS ORDERED:**

23 1. Plaintiff's request for an order requiring DHS to produce the requested
24 information is denied.

25 2. The Clerk shall terminate this action.

26 DATED this 7th day of September, 2010.

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David G. Campbell
United States District Judge